

Overview – State Assumption of Section 404 Permit Authority 16 October 2018

In July 2018, the U.S. Army Corps of Engineers reversed position and became supportive of States and Tribes assuming Section 404 permit authority under the Clean Water Act. That reversal, along with resolution of previous issues and strong initial support from local government stakeholders, indicate the time may be right for Oregon to again explore a single state-led process for obtaining state and federal wetland and water permits.

Resolution of Previous Issues

In addition to this recent federal agency support for a single, state-led permitting process, several key issues identified during 2012 assumption discussions have either been resolved (assumable waters) or more fully fleshed out (ESA consultation):

- **Assumable waters.** Upcoming Environmental Protection Agency rulemaking will incorporate federal policy*, providing states with clear scope and guidance regarding assumable waters. The scope of waters and adjacent wetlands that may be assumed by a state or tribe will now be consistent with Oregon recommendations. Non-assumable Oregon waters would be determined using existing lists of navigable rivers, harbors and bays** as a starting place. Most freshwater wetlands would be assumable, as would all non-navigable streams.
- **Federal Endangered Species Act compliance.** Given what are now known as assumable waters in Oregon, it appears that from January 1, 2016 to present most Corps-permitted activities in streams occupied by listed fish, where covered by programmatic consultations. In fact, it appears that only about 5% of these permits required more difficult and time-consuming individual consultations. DSL is conducting an in-depth review of consultation data provided by the Corps and will confirm these assumptions. Specific mechanisms still need to be developed for the state to coordinate with the Services and an approach*** has been developed for further discussion.

Issues remaining from 2012

- **Tribal consultation.** A state-issued 404 permit does not provide the federal nexus needed for Tribes to consult with the federal government under the Historic Preservation Act. Oregon would need to develop an alternative process to meet the needs and expectations of the Tribes for project consultation.
- **Funding.** As noted below, analysis is needed to determine what staffing levels are required for a state-led program.

Basic Requirements for State Assumption

Required Authorities, Standards, and Resources (note that the answers to these questions are based on SB 172 (2001)—see *Required Approvals*, below)

- **Jurisdiction over all waters, including wetlands, of the United States, excluding waters where the U.S. Army Corps of Engineers retains jurisdiction.** *Oregon meets this requirement.*
- **Authority to regulate all activities regulated under federal law.** Activities not exempt under the federal Clean Water Act cannot be exempted by states. Some state

agricultural exemptions would need to be repealed because they appear to have been added after 2001.

- **Permitting standards that are as stringent as federal standards.** This ensures consistency with federal permitting criteria. *Oregon meets this requirement.*
- **Compliance and enforcement authority.** This includes the ability to enforce permit conditions, and to address violations with penalty levels that are at least comparable to federal fines and penalties. *Oregon meets this requirement.*
- **Program funding and staffing is enough to support implementation and ongoing operations, including enforcement.** *Additional analysis of funding and staffing is needed.*

Required Approvals

- **Governor requests review of application.** A letter from the Governor to the Environmental Protection Agency is required to initiate review of the state's application for 404 assumption.
- **Legislative approval needed to make prior statutory changes operative.** Most statutory changes needed for state assumption were already implemented through SB 172 (2001) but do not become operative without additional approval from the Legislature (ORS 196.800(17)—*Operation of the amendments to 196.800 by section 1, chapter 516, Oregon Laws 2001, is dependent upon further approval by the legislative Assembly...*). EPA review of the state's assumption application may result in the need for additional statutory changes.

Public Support

The challenges presented by the existing state and federal permitting processes are of significant concern to local governments and economic development agencies. With the recent federal reversal regarding state assumption, DSL expects increasing interest in Oregon assuming Section 404 permit authority. To date:

- The Cascades West Regional Consortium (CWRC) has submitted a letter to Director Walker **** requesting that the state explore assumption by forming a working group to examine remaining issues and develop potential solutions. The CWRC letter addresses economic development opportunities or barriers and is signed by the Cities of Adair Village, Albany, Brownsville, Corvallis, Halsey, Harrisburg, Millersburg, Monroe, Philomath and Tangent.
- CWRC representatives have indicated that improving wetland mitigation and permitting is of statewide importance, and they intend to reach outside their jurisdictions for additional support of assumption efforts.
- The League of Oregon Cities (LOC) Community Development Policy Committee has adopted a goal of having the League work on assumption as a LOC priority.

Next Step Considerations

A door has opened for Oregon to assume Section 404 permit authority and thorough consideration of remaining issues is essential. Creation of a working group, as suggested and supported by the CWRC, could help identify issues, gather information, and develop solutions. Overall, assumption of Section 404 permit authority would need to:

- Ensure Oregon's existing robust permit system continues to protect our natural resources
- Establish a single, state-led process for obtaining state and federal permits that works at least as well as the existing state process and tangibly streamlines the process
- Ensure that offering state-issued 404 permits to applicants is financially sustainable

To raise more revenue to support increased staffing levels, permit application fees will need to increase. Since time is money and permitting delays are costly, having one state-led process will persuade the public that these fee increases are cost-effective investments and ensure their support.

Referenced Documents

- * *July 2018 Memorandum for Commanding General, U.S. Army Corps of Engineers, re: Clean Water Act Section 404(g) Non-Assumable Waters*
- ** *Navigable Harbors and Bays within the State of Oregon*
- ** *Navigable Riverways within the State of Oregon*
- *** *Report on the State of Oregon's Proposed Assumption of Clean Water Act §404 Permit Authority and Integration of Endangered Species Act Requirements*
- **** *Letter from Cascade West Regional Consortium to Vicki Walker, Director, Department of State Lands, dated September 21, 2018.*